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In the Supreme Court  
OF THE  
United States

OCTOBER TERM, 1958

No. ~~400~~ 40

TERRITORY OF ALASKA,

*Petitioner,*

vs.

AMERICAN CAN COMPANY, FIDALOO  
ISLAND PACKING COMPANY, LIBBY,  
MCNEILL & LIBBY, INC., NAKAT PACK-  
ING COMPANY, NEW ENGLAND FISH  
Co., P. E. HARRIS COMPANY, INC.,  
PACIFIC & ARCTIC RAILWAY & NAVI-  
GATION Co., and OCEANIC FISHERIES  
Co.,

*Respondents.*

BRIEF FOR RESPONDENTS.

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In the Supreme Court  
OF THE  
United States

OCTOBER TERM, 1957

No. 833

TERRITORY OF ALASKA,

*Petitioner,*

vs.

AMERICAN CAN COMPANY, FIDALGO  
ISLAND PACKING COMPANY, LIBBY,  
MCNEILL & LIBBY, INC., NAKAT PACK-  
ING COMPANY, NEW ENGLAND FISH  
Co., P. E. HARRIS COMPANY, INC.,  
PACIFIC & ARCTIC RAILWAY & NAVI-  
GATION Co., and OCEANIC FISHERIES  
Co.,

*Respondents.*

BRIEF FOR RESPONDENTS.

NO CASE FOR WRIT OF CERTIORARI IS SHOWN  
BY THE PETITION.

I.

EXCLUSION OF EVIDENCE AND  
STATUTORY CONSTRUCTION.

The first two questions presented by the petition  
deal with exclusion of evidence by the trial Court and

the interpretation of a territorial statute by the Appellate Court. Obviously neither question is of a nature or of such importance that this Court will grant certiorari. Petitioner apparently feels the same way since neither proposition receives additional mention in the petition. Nor will we elaborate on them further.

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## II.

### **DUE PROCESS OF LAW AND EQUAL PROTECTION OF LAW.**

Petitioner states (Pet. 10) that by its petition for rehearing filed in the Appellate Court "your appellant injected the issue of constitutionality \* \* \*". This is a true statement. No question of constitutionality was previously urged or considered in either the trial or Appellate Courts. The statement of points upon appeal (Record 70, 71) fails to mention the issue of constitutionality; nor was it mentioned in the briefs or arguments below.

No such question existed below and none exists here except as "injected" by appellant in the hope of bringing the case within the scope of the rules and precedents of this Court respecting the granting of certiorari.

Petitioner (Pet. 3) asks whether the territorial statute repealing the Alaska Property Tax Act as construed by the Court below "is valid under the due process and equal protection clauses of the Fourteenth Amendment of the United States Constitution and Section 9 of the *Alaska Organic Act*, 48 U. S. 78, Sec. 48-1-1 ACLA 1949".

(a) Fourteenth Amendment Not Applicable to Territories.

Petitioner at this point ignores the fact that the Fourteenth Amendment applies only to the sovereign states, *Boling v. Sharpe*, 347 U.S. 497; 74 S. Ct. 693; and has no force in the territories, *Farrington, Governor v. Tokushige*, 373 U.S. 234; 47 S. Ct. 406.

Petitioner's reference to Section 9 of the Alaska Organic Act is not clear. This is an act of Congress delegating limited legislative power to the Territorial Legislature "not inconsistent with the constitution and laws of the United States". Such language clearly does not make the Territory a state nor extend to it the provisions of the constitution, applicable only to states.

In *Farrington, Governor v. Tokushige, supra*, involving application of constitutional restrictions to Territorial legislation, the Court applied the "due process" clause of the Fifth Amendment and not the similar language of the Fourteenth Amendment.

(b) Statutory Construction Not a Constitutional Question.

Nor is *Mullaney v. Anderson*, 342 U.S. 415, 420; 72 S. Ct. 428, 431; 13 Alaska 574, 580, helpful to petitioner's position. There the Court, after pointing out that Congress has extended the constitution to Alaska and delegated legislative power over "all rightful subjects of legislation not inconsistent with the constitution and the laws of the United States", held that it could not be presumed "that Congress authorized the Territorial Legislature to treat citizens of a state the way states cannot treat citizens of sister states".

The Court further said that, "only the clearest expression of congressional intent could induce such a result. It is not present". The Act failed for lack of delegated authority and not because of the constitutional inhibitions.

The same result is reached if it be asserted that the action of the Territorial Legislature is prohibited by the *Civil Rights Act*, 16 Stat. 144, Title 42 U.S.C. Sec. 1981. That prohibition although similar to the Fourteenth Amendment is by act of Congress and not by force of the constitution. These are questions for the trial and appellate Courts; although the record fails to disclose that they were raised there.

**(c) Lower Court Decisions Correct.**

But even if Alaska were a state, which it isn't, and the Fourteenth Amendment applied, which it doesn't, and the point had been raised by petitioner below, which it wasn't, the lower Court's decision would have been the same. Equal protection of the laws is not denied and discrimination is not practiced by the application of established principles of common law respecting the construction of statutes and the effect of repeals. Cases cited by petitioner arose in state Courts and concerned the construction and application of state constitutions and state laws. In every instance it was the constitution of the state which was offended; not the Constitution of the United States.

**(d) No Violation of Fifth Amendment.**

Elsewhere in the petition (Pet. 11) it is alleged that the Territorial Act as interpreted below "consti-

tutes a denial of due process and equal protection of the laws under the Fifth \* \* \* Amendments". The Fifth Amendment is applicable but it contains no provision respecting equal protection of the laws. It does prohibit the taking of life, liberty or property without due process of law. There is no suggestion that life or liberty are involved here.

That leaves property. But who is being deprived of property without due process of law? Certainly not petitioner. What of the 11,504 who paid in excess of four hundred thousand dollars in taxes under the Act before its repeal? (Pet. 7, 16.) How are they denied due process of law? Some of them contested the validity of the tax act on that very ground. The Act was held valid by the Circuit Court of Appeals for the Ninth Circuit in *Hess v. Mullaney*, 213 F. 2d 635; 15 Alaska 40, and certiorari was denied by this Court. The petition for certiorari raised the question of violation of the Fifth Amendment. (*Luther C. Hess, et al., Pet. v. Karl F. Dewey, Commissioner of Taxation of the Territory of Alaska*, No. 266, 348 U.S. 836; 75 S. Ct. 50.)

In the lower Courts petitioner wisely refrained from asserting the Territorial Repealing Act to be in violation of the Fifth Amendment. None of the alleged defects run counter to the due process clause. This Court denied a similar effort in *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, 400; 60 S. Ct. 907, 916, where Justice Douglas said:

"Appellant contends that the statutory classification \* \* \* and the application of the \* \* \* tax

\*\*\* are improper under the Fifth Amendment. Its objection is not premised on lack of due process nor could it be in view of the elaborate machinery and procedure for the act's enforcement which Congress has provided. Rather appellant's objection is founded on its claim of discrimination. But the Fifth Amendment, unlike the Fourteenth, has no equal protection clause."

This Court was equally specific in *Helvering v. Lerner Stores*, 314 U.S. 463, 468; 62 S. Ct. 341, 343, where Justice Douglas pointed out that the contention that the provisions of the act, there under consideration, run afoul of the Fifth Amendment was without merit and said that "a claim of unreasonable classification or inequality in the incident of the application of a tax, raises no question under Fifth Amendment which contains no equal protection clause".

Again in *Detroit Bank v. United States*, 317 U.S. 329, 337; 63 S. Ct. 297, 301; this Court declared that "unlike the Fourteenth Amendment the Fifth Amendment contains no equal protection clause and provides no guaranty against discriminatory legislation by Congress."

(e) "Due Process of Law" means "the Law of the Land".

The lower courts afforded petitioner "due process of law" when they applied the ancient and universal rule of the common law which provides that the repeal of a statute extinguishes all penalties and liabilities created by the statute and unpaid on the date of the

repeal unless the same are kept alive by a specific saving clause. The rule applies to repealed tax statutes and was well established in England before the adoption of the federal constitution. *Rex v. Justices of London*, 3 Burr 1456. It was reiterated in 1804 by Justice Washington in *United States v. Passmore*, 4 Dallas 372; 1 L. ed. 871. See also *Norris v. Crocker*, 13 Howard 429; 14 L. ed. 210; *ex parte William McCardle*, 7 Wallace 506; 19 L. ed. 264; *Flanagan v. County of Sierra*, 196 U.S. 553; 25 S. Ct. 314. There is no authority to the contrary.

The lower court further held that "on reason and authority \* \* \* the repealing statute \* \* \* means precisely what it says" (Pet. App. 42) and that the special saving clause of the repealing statute nullified petitioner's alleged rights under the general saving statute. There was ample authority for such holding.

This is "the law of the land" which this Court in *Den v. Hoboken Land and Improvement Co.*, 18 Howard 272, 276; 15 L. ed. 372, 374, held was undoubtedly intended to convey the same meaning as due process of law. In that decision it is pointed out that Lord Coke in his commentary (2 Inst. 50) on the words by "the law of the land" as used in Magna Charta says that they mean "due process of law".

Petitioner was accorded "due process of law" but "by the law of the land" his case failed.

(f) Petitioner Has No Capacity to Raise Question.

But this is not all. Even if the constitutional questions had merit, still petitioner has no capacity or authority to raise them either here or below.

Petitioner would have the Court declare the Territorial Repealing Statute unconstitutional. But the Court will grant such relief in proper cases only by enjoining enforcement of the invalid statute by officials charged with that duty. Such officials are not before the Court unless it be the Attorney General of Alaska who appears here for petitioner. Petitioner's counsel can hardly seek an order against himself.

But it was said long ago by Justice White in *Del Castillo v. McConnico*, 168 U.S. 674; 18 S. Ct. 229, 232, petitioner "is limited solely to the inquiry whether, in the case of petitioner, the effect of applying the statute is to deprive him of his property without due process of law". (Emphasis supplied.) Petitioner's property was not taxed. "The mere fact that a state is plaintiff is not enough", *Florida v. Mellon*, 273 U.S. 12; 47 S. Ct. 265, 266, and a territory has no better standing than a state. *Puerto Rico v. Secretary of Agriculture*, 338 U.S. 604; 70 S. Ct. 403. See also *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288; 56 S. Ct. 466, 472. *Georgia v. Pennsylvania*, 324 U.S. 439; 65 S. Ct. 716. The alleged discrimination, inequality and failure of due process of law, if it existed, could injure only those people who paid taxes levied under the act before its repeal. Petitioner is not of the group and cannot represent the group. *Massachusetts v. Mellon*, 262 U.S. 447; 43

S. Ct. 597, 600. As Mr. Justice Cardoza said in *Henneford v. Silas Mason Co.*, 300 U.S. 577, 583; 57 S. Ct. 524, 527; 81 L. ed. 814, "the plaintiffs are not the champions of any rights except their own".

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**CONCLUSION.**

The petition should be denied.

Dated, Juneau, Alaska,  
March 12, 1958.

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